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In The Supreme Court of the United States

JOANNE HEDRICK,
Petitioner,

v.

WESTERN RESERVE CARE SYSTEM; FORUM HEALTH,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the *prima facie* case of an ADA plaintiff requires a showing that she was not hired solely because of her disability?

2. Whether an employer has an affirmative obligation to assign a qualified disabled employee to a vacant position?

3. Whether a disabled employee, who the court determines did not accept a reasonable accommodation, will no longer be entitled to other reasonable accommodations?

4. Whether a court may grant a summary judgment in an employment discrimination case, where the employee's asserted non-discriminatory reason is that a better applicant was selected, and where the court does not review or address the relative qualifications of the applicants.

5. Whether the court below properly applied this Court's decision in Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), in affirming a summary judgment where plaintiff established a *prima facie* case of employer discrimination and presented evidence that the employer's stated reason was pretextual?

LIST OF PARTIES

The Appellant in the proceeding below was Joanne Hedrick. The Appellees in the proceeding below were Western Reserve Care System (WRCS) and Forum Health. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties ii

Table of Contents iii

Table of Authorities v

Petition for a Writ of Certiorari 1

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions and Statutes Involved 1

Statement of the Case 2

Argument 6

I. Review is appropriate to resolve a conflict among the circuits as to the elements of a *prima facie* case under the ADA 7

II. Review is appropriate to resolve a conflict among the circuits as to whether an employer is required to assign a qualified and disabled employee to a vacant position without consideration of the relative qualifications of other applicants who are not disabled. The decision below that the ADA does not confer a preference upon those with disabilities is contrary to this Court's ruling in U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002) 10

III. Review is appropriate to consider the circumstances under which a disabled employee's failure to staff a vacant position relieves the employer of its duty to provide a reasonable accommodation 13

IV. Review is appropriate to consider whether the claim that a better applicant was chosen satisfies an employment discrimination defendant's duty to provide a non-discriminatory reason for the challenged employment decision, and whether, if such a claim is made, a court is required to consider the relative qualifications of the applicants 18

V. Review is appropriate since the decision below is contrary to this Court's ruling in Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Review would also allow the Court to address a split among the circuits concerning this Court's decision in Reeves 21

Conclusion 28

TABLE OF AUTHORITIES

Cases Cited: **Page**

Aka v. Washington Hospital Center,
156 F.3d 1284 (D.C. Cir. 1998) 12

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S.Ct. 2505,
91 L.Ed.2d 202 (1986) 13

Bailey v. Georgia-Pacific Corp.,
306 F.3d 1162 (1st Cir. 2002) 8

Blow v. City of San Antonio, Texas,
236 F.3d 293 (5th Cir. 2001) 27

Cameron v. Community Aid for Retarded Children, Inc.,
335 F.3d 60 (2nd Cir. 2003) 8

Croy v. Cobe Laboratories,
345 F.3d 1199 (10th Cir. 2003) 8

Davidson v. America Online, Inc.,
337 F.3d 1179 (10th Cir. 2003) 8

Dennis v. Columbia Colleton Medical Center, Inc.,
290 F.3d 639 (th Cir. 2002) 26

Dyke v. O'Neal Steel, Inc.,
327 F.3d 628 (7th Cir. 2003) 8

Gagliardo v. Connaught Laboratories, Inc.,
311 F.3d 565 (3rd Cir. 2002) 8

Giebeler v. M & B Associates,
343 F.3d 1143 (9th Cir. 2003) 12

Hedrick v. Western Reserve Care System,
355 F.3d 444 (6th Cir.
2004) 1, 7-8, 11, 13- 15, 18-19, 21-23

Holtzclaw v. DSC Communications Corp.,
255 F.3d 254, 258 (5th Cir. 2001) 8

Jones v. City of Monroe, Michigan,
341 F.3d 474 (6th Cir. 2003) 10

Kaplan v. City of North Las Vegas,
323 F.3d 1226 (9th Cir. 2003) 8

Layman v. Alloway Stamping & Machine Company,
2004 WL 719262 (6th Cir. 2004) 10

Longen v. Waterous Co.,
347 F.3d 685 (8th Cir. 2003) 8

Lucas v. W. W. Grainger, Inc.,
257 F.3d 1249 (11th Cir. 2001) 8

Monette v. Electronic Data Systems Corp.,
90 F.3d 1173 (6th Cir. 1996) 7

Norville v. Staten Island University Hospital,
196 F.3d 89 (2nd Cir. 1999) 16-17

Office of the Architect of the Capital v. Office of
Compliance, 361 F.3d 633 (Fed. Cir. 2004) 8

Parker v. Columbia Pictures Indus.,
204 F.3d 326 (2nd Cir. 2000) 8-9

Price Waterhouse v. Hopkins,
490 U.S. 228, 109 S.Ct. 1775,
104 L.Ed.2d 268 (1989) 9-10

Reeves v. Sanderson Plumbing Prods. Inc.,
530 U.S. 133, 120 S.Ct. 2097,
147 L.Ed.2d 105 (2000) ..... i, 13, 21-26, 28

Rhoads v. Federal Deposit Insurance Corp.,
257 F.3d 373 (4th Cir. 2001) 8

Smith v. Midland Brake, Inc.,
180 F.3d 1154 (10th Cir. 1999) 12

Taylor v. Small,
350 F.3d 1286 (D.C. Cir. 2003) 8

Texas Dept. of Community Affairs v. Burdine,
450 U.S. 248, 101 S.Ct. 1089,
67 L.Ed.2d 207 (1981) 19

U.S. Airways, Inc. v. Barnett,
535 U.S. 391, 122 S.Ct. 1516,
152 L.Ed.2d 589 (2002) 10, 11, 12

Zimmermann v. Associates First Capital Corp.,
251 F.3d 376 (2nd Cir. 2001) 27-28

Other Authorities Cited:

28 U.S.C. §1254 1
28 U.S.C. §1331 2
28 U.S.C. §1367 2
29 U.S.C. §626(c) 2
29 U.S.C. §794(a) 7
42 U.S.C. §2000e-2(a)(1) 9-10
42 U.S.C. §2000e-5 2
42 U.S.C. §12112(a) 7, 9
42 U.S.C. §12117 2

Age Discrimination in Employment Act,
29 U.S.C. §621, et seq. 2

Americans with Disabilities Act
Ohio Revised Code Chapter 4112 2

Section 107(a) of the ADA 2

Section 706 of Title VII of the Civil Rights
Act of 1964, as amended 2

Rehabilitation Act. H. R. Rep. No. 485 (II),
101st Cong., 2nd Sess., (1990) 9

S. Rep. No. 116, 101st Cong., 1st Sess.(1989) 9

APPENDIX

Appendix A,
Opinion entered by the United States
Court of Appeals for the Sixth Circuit
on January 9, 2004 ..... App. A-1

Appendix B,
Petition for Rehearing *En Banc* filed by
Petitioner, United States Court of Appeals
for the Sixth Circuit denied
on March 4, 2004 ..... App. B-1

Appendix C,
Judgment Entry of the United States District
Court for the Northern District of Ohio,
entered on June 27, 2002 ..... App. C-1

Appendix D,
Relevant statutory provisions ..... App. D-1

Appendix E,
Layman v. Alloway Stamping & Machine
Company, 2004 WL 719262 (6th Cir. 2004) .... App .E-1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Joanne Hedrick respectfully petitions for a Writ of Certiorari to review the January 9, 2004 Opinion of the United States Court of Appeals for the Sixth Circuit, Apdx. A, which affirmed the judgment entered by the United States District Court for the Northern District of Ohio on June 27, 2002. Apdx. C.

OPINIONS BELOW

The judgment of the United States District Court for the Northern District of Ohio, entered on June 27, 2002, Apdx. C, is not officially reported. The Opinion of the United States Court of Appeals for the Sixth Circuit entered on January 9, 2004, Apdx. A, is reported at 355 F.3d 444.

STATEMENT OF JURISDICTION

This Petition seeks review of an Opinion entered by the United States Court of Appeals for the Sixth Circuit on January 9, 2004. Apdx. A. A petition for a rehearing *en banc* filed by Petitioner was denied by the United States Court of Appeals for the Sixth Circuit on March 4, 2004. Apdx. B.

Petitioner Joanne Hedrick seeks to invoke the jurisdiction of this Court to review the Opinion of the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant statutory provisions are set out in Apdx. D.

STATEMENT OF THE CASE

This action was commenced by Petitioner Joanne Hedrick in the United States District Court for the Northern District of Ohio. Hedrick, a nursing employee of Western Reserve Care System ("WRCS"), Respondent here, asserted disability and age discrimination claims arising out of the staffing of six vacant positions.

The Complaint stated that Respondent WRCS, and affiliated medical provider Forum Health, discriminated on the basis of Hedrick's disability in violation of the Americans with Disabilities Act, and Ohio Revised Code Chapter 4112, and her age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq. Jurisdiction was asserted under Section 107(a) of the ADA, 42 U.S.C. Section 12117, which incorporates by reference Section 706 of Title VII of the Civil Rights Act of 1964, as amended by 42 U.S.C. Section 2000e-5; 29 U.S.C. Section 626(c); 28 U.S.C. Section 1331; and the supplemental jurisdiction of the court pursuant to 28 U.S.C. Section 1367.

There is no dispute that Hedrick, who was employed by WRCS since 1973, was qualified for the vacant positions. But WRCS selected non-disabled and less experienced employees to staff these six vacant positions. Five of the six positions were given to employees who were substantially younger and less experienced than Hedrick.

Hedrick, who was born in 1948, received an Associate's degree in nursing in 1973. Upon graduation, Hedrick was employed as a Staff Nurse by the Youngstown Hospital Association, the prior name of WRCS.

Hedrick was diagnosed with osteoarthritis in her left knee in the 1980s. In 1991 or 1992, the condition progressed, and she was treated for osteoarthritis in both knees. On December 1, 1995, Hedrick fell and broke her leg. She was unable to work and took a leave of absence from her position at WRCS.

Her treating physician advised WRCS officials that Hedrick would not be able to return to her position as a Staff Nurse. In order to determine her ability to work, WRCS conducted a Functional Capacity Evaluation. The Evaluation concluded that Hedrick "would not be able to return to her previous level of function as a staff nurse at Western Reserve Care System..." (Steen Dep. at p.14).

WRCS maintains a list of employees with medical restrictions. The list is known as the ADA List. After verifying her condition with in-house physicians, WRCS determined that Hedrick had permanent restrictions which prevented her from returning to her prior position. Hedrick was then placed by WRCS on its ADA List.

After Hedrick was placed on the ADA List, she applied for six vacant positions. From October 1996 to August 1997, there were four vacant Case Manager positions and two vacant Quality Assurance positions. There is no dispute that Hedrick applied for each vacancy and was interviewed and considered by WRCS for the positions. Nor is there any dispute that Hedrick satisfied the objective qualifications for each position. WRCS selected a non-disabled employee for each vacancy, though Hedrick was on the ADA List created and maintained by WRCS.

In affirming the dismissal of the ADA claim, the appellate court did not consider the issue of whether Hedrick had a disability. Rather, it focused exclusively on whether Hedrick was a qualified individual with a disability. The court below, believing that Hedrick refused a position, concluded that she was not a qualified individual with a disability.

The same month that the first Quality Assurance vacancy was staffed, there was an opening for a Referral Center Scheduler job. Although Hedrick discussed the Scheduler position with WRCS officials, all agreed that it was not a suitable position for Hedrick, and Hedrick was never offered the position.

The Scheduler job paid substantially less than Hedrick's former position, and WRCS officials recognized that it would not be suitable in light of Hedrick's experience and training. Though acknowledging that the position was not offered, the courts below ruled that Hedrick forfeited her rights under the ADA by not becoming a Referral Center Scheduler. The same month the Scheduler position became vacant, WRCS staffed a Quality Assurance position which was more in line with Hedrick's training and experience.

Though ruling that Hedrick was no longer a qualified individual with a disability, the following facts were not disputed by the courts below:

- Hedrick remained on WRCS's ADA List;
- Hedrick applied for and was considered for the six vacant positions;
- Hedrick was qualified for the vacant positions; and

- WRCS chose six non-disabled individuals to staff the vacant positions.

In defending the six challenged employment decisions, WRCS asserted that better qualified candidates were chosen to staff the six vacant positions. The courts below accepted the claim that better qualified candidates were selected and did not address or consider the relative qualifications of the successful candidates.

Respondents moved for a summary judgment. WRCS argued, and the lower courts agreed, that in establishing a *prima facie* case under the ADA, Hedrick had to establish that she was denied a position solely because of her disability.

The court further ruled that the ADA does not provide a preference for disabled employees. Even if qualified for a vacant position, the court ruled, WRCS could consider non-disabled applicants for the vacant position. With respect to the age discrimination claim, the court below acknowledged that Hedrick established a *prima facie* case and presented evidence of pretext. But the appellate court concluded that WRCS was entitled to judgment as a matter of law.

The lower courts further ruled as a matter of law that WRCS selected the better qualified applicant for the six vacant positions. In so ruling, the courts below did not address evidence that Hedrick had more training and experience than the non-disabled and younger applicants.

The District Court granted summary judgment dismissing Petitioner's Complaint. The United States Court of Appeals for the Sixth Circuit affirmed, and denied a Petition for Rehearing *En Banc*.

ARGUMENT

The ruling below is in direct conflict with the holdings of other Circuits, and departs from the decisions of this Court on several issues, including:

- Whether an ADA plaintiff must establish that she was denied a position solely because of her disability;

- Whether the ADA requires a preference for qualified disabled employees;
  Whether an employee who rejects a vacant position forfeits her right to a reasonable accommodation under the ADA;

- Whether a court can accept the asserted non-discriminatory reason that more qualified applicants were selected for vacant positions without addressing the relative qualifications of plaintiff and the successful applicants; and

- Whether an age discrimination claim is properly dismissed as a matter of law where there is no dispute that the plaintiff established a *prima facie* case and presented evidence of pretext.

The lower court's treatment of these significant issues is in direct conflict with the rulings of other Circuits, and the holdings of this Court, and merits this Court's review.

I. REVIEW IS APPROPRIATE TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO THE ELEMENTS OF A *PRIMA FACIE* CASE UNDER THE ADA.

The Sixth Circuit is the only Circuit which requires an ADA plaintiff to show that discriminatory animus was the sole reason for the challenged employment decision. The "solely" requirement creates a conflict among the Circuits, is contrary to the statute, and inconsistent with the rulings of this Court.

The district court held that the ADA required Hedrick to establish that WRCS denied her a position "solely because of unlawful disability discrimination." 355 F.3d at 453. The court below ruled that "the district court did not err in requiring Hedrick to show that her disability was the sole reason for WRCS's decision..." 355 F.3d at 454. In so ruling, the appellate court relied upon its decision in Monette v. Electronic Data Systems Corp., 90 F.3d 1173 (6th Cir. 1996).

Monette compared the ADA to the Rehabilitation Act. The critical language in the Rehabilitation Act is "solely by reason of [an individual's] disability..." 29 U.S.C. §794(a), Appendix (App.) at D-2. But in drafting the ADA, Congress prohibited discrimination "because of the disability..." 42 U.S.C. §12112(a), App. at D-4. The court in Monette engrafted the "solely" requirement on the statute.

The appellate court acknowledged that "some of our sister circuits have held that an ADA plaintiff need not demonstrate that disability was the sole reason for the adverse employment action but only that it played a motivating role in the decision, e.g., Parker v. Columbia Pictures Indus., 204 F.3d 326, 337 (2nd Cir. 2000)..." 355 F.3d at 454.[1] The court in Parker explained:

> "The ADA makes it unlawful for an employer to discriminate against a qualified individual '*because of* the disability of such individual.' 42 U.S.C. §12112(a) (emphasis added). This statutory language differs from that used in the Rehabilitation Act of 1973, which prohibits entities receiving federal funding from discriminating 'solely by reason of [an individual's] disability.' 29 U.S.C. §794 (1994). The elimination of the word 'solely'

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[1]No other circuit requires that disability be the sole reason for the challenged employment decision. In fact, that requirement is contrary to holdings of every circuit. See Bailey v. Georgia-Pacific Corp., 306 F.3d 1162, 1166 (1st Cir. 2002); Cameron v. Community Aid for Retarded Children, Inc., 335 F.3d 60, 62 (2nd Cir. 2003); Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565, 568 (3rd Cir. 2002); Rhoads v. Federal Deposit Insurance Corp., 257 F.3d 373, 387 (4th Cir. 2001); Holtzclaw v. DSC Communications Corp., 255 F.3d 254, 258 (5th Cir. 2001); Dyke v. O'Neal Steel, Inc., 327 F.3d 628, 632 (7th Cir. 2003); Longen v. Waterous Co., 347 F.3d 685, 688 (8th Cir. 2003); Kaplan v. City of North Las Vegas, 323 F.3d 1226, 1229 (9th Cir. 2003); Croy v. Cobe Laboratories, 345 F.3d 1199, 1203-1204 (10th Cir. 2003); Davidson v. America Online, Inc., 337 F.3d 1179, 1188 (10th Cir. 2003); Lucas v. W. W. Grainger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001); Taylor v. Small, 350 F.3d 1286, 1292 (D.C. Cir. 2003); Office of the Architect of the Capital v. Office of Compliance, 361 F.3d 633, 639 (Fed. Cir. 2004).

> from the causation provision of the ADA suggests forcefully that Congress intended the statute to reach beyond the Rehabilitation Act to cover situations in which discrimination on the basis of disability is one factor, but not the only factor, motivating an adverse employment action. ...see also McNely, 99 F.3d at 1074 ('[W]e believe that importing the term "solely" into the ADA is not warranted under the statute's plain language...')." 204 F.3d at 337.

In drafting the ADA, Congress considered and rejected adopting the "solely" requirement of the Rehabilitation Act. H. R. Rep. No. 485 (II), 101st Cong., 2nd Sess., at 85 (1990), see also S. Rep. No. 116, 101st Cong., 1st Sess., at 44-45 (1989). The cited Congressional reports pointedly observed that "a literal reliance on the phrase 'solely by reason of his or her handicap' leads to absurd results."

Though this Court has not considered the issue under the ADA, it did address the identical language used in Title VII. In Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), this Court explained that "we know that the words 'because of' do not mean 'solely because of...'" 490 U.S. at 241.

Price Waterhouse involved Title VII, not the ADA. But the critical language is the same. The ADA makes it unlawful to discriminate against an individual "because of the disability of such individual". 42 U.S.C. §12112(a), App. at D-4. Like the ADA, Title VII prohibits employers from discriminating "because of" a protected characteristic. 42 U.S.C. §2000e-

2(a)(1), App. at D-2. The panel's decision cannot be squared with this Court's ruling in Price Waterhouse.

The Sixth Circuit continues to require a disability discrimination plaintiff as part of a *prima facie* case to establish that the defendant acted "solely because of her disability." Jones v. City of Monroe, Michigan, 341 F.3d 474, 477 (6th Cir. 2003); Layman v. Alloway Stamping & Machine Co., Inc., 2004 WL 719262, (6th Cir. 2004), Appendix E. Review is appropriate to bring the Circuit in line with the language and Congressional history of the ADA, the rulings of every other Circuit, and this Court's decision in Price Waterhouse.

II. REVIEW IS APPROPRIATE TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER AN EMPLOYER IS REQUIRED TO ASSIGN A QUALIFIED AND DISABLED EMPLOYEE TO A VACANT POSITION WITHOUT CONSIDERATION OF THE RELATIVE QUALIFICATIONS OF OTHER APPLICANTS WHO ARE NOT DISABLED. THE DECISION BELOW THAT THE ADA DOES NOT CONFER A PREFERENCE UPON THOSE WITH DISABILITIES IS CONTRARY TO THIS COURT'S RULING IN U.S. AIRWAYS, INC. V. BARNETT, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002).

Hedrick was qualified and disabled, and should have been assigned to a vacant position for which she was qualified

without any consideration of the relative qualifications of other candidates. The court below disagreed, stating that "her disability did not provide her with a preference in WRCS's hiring practices." 355 F.3d at 459. The statement is squarely contrary to the ruling of this Court in U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002).

In Barnett, the employer argued that the ADA required only "equal" treatment for those with disabilities and did not require an employer to grant preferential treatment. 535 U.S. at 397. This Court disagreed and held that:

> "The Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach." 535 U.S. at 397.

This Court recognized that under the Act "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." 535 U.S. at 397.

This Court's decision considered the reach of the accommodation obligation and, as one appellate court observed, held "that an accommodation may indeed result in a preference for disabled individuals over otherwise similarly situated nondisabled individuals." Giebeler v. M & B Associates, 343 F.3d 1143, 1150 (9th Cir. 2003). Under Barnett, "reasonable accommodation in the service of equal opportunity may require preferential treatment of the disabled..." 343 F.3d at 1150.

The courts in Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) and Aka v. Washington Hospital Center, 156 F.3d 1284 (D.C. Cir. 1998) recognized that an employer has an affirmative obligation to assign a qualified, disabled employee to a vacant position. The court in Smith rejected the argument that an employer satisfies its obligation to provide a reasonable accommodation "by the simple expedient of finding another job applicant that the employer regards as more qualified." 180 F.3d at 1169.

The court below cited and followed decisions from other Circuits holding that the ADA does not mandate preferential treatment. The decisions relied upon pre-dated this Court's Opinion in Barnett.

Review is appropriate to resolve the split among the Circuits and to clarify this Court's ruling in Barnett recognizing that the ADA could require preferential treatment for disabled individuals.

III. REVIEW IS APPROPRIATE TO CONSIDER THE CIRCUMSTANCES UNDER WHICH A DISABLED EMPLOYEE'S FAILURE TO STAFF A VACANT POSITION RELIEVES THE EMPLOYER OF ITS DUTY TO PROVIDE A REASONABLE ACCOMMODATION.

In affirming summary judgment in favor of WRCS, the appellate court held that it need not decide "whether Hedrick was 'disabled' under the ADA because it is clear that, even assuming that she was disabled, she was not a qualified individual with a disability." 355 F.3d at 456. The court adopted the findings of the District Court "that the referral center scheduler position was a reasonable accommodation and that Hedrick cannot be considered a qualified individual with a disability based upon her rejection of that position." 355 F.3d at 458. In so ruling, the court made factual findings not appropriate on a summary judgment.

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), this Court explained that in ruling on a summary judgment "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge..." 477 U.S. at 255. In considering whether a summary judgment is appropriate, a court "must disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 135, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

The court below strayed from these settled guidelines in determining that Hedrick was not a qualified individual with a disability as a matter of law. The court resolved several disputed factual issues, including 1) whether the employee was offered the vacant position; 2) whether the position constituted a reasonable accommodation; and 3) whether the employer should have offered another position comparable to the employee's prior position.

1. A threshold issue is whether the Referral Center Scheduler position was offered to Hedrick. The court below acknowledged that "...it is unclear whether WRCS formally offered the position to Hedrick...," but found that Hedrick "preemptively rejected the position by informing Nelson and Foley that she would not take the position because of its low salary..." 355 F.3d at 458.

Nelson and Foley are WRCS officials who recognized that the position was not suitable for Hedrick in light of her training and many years of service. The position was, therefore, never offered to Hedrick.

Director of Quality Management Nelson told Hedrick that she was overqualified for the position. (Hedrick Dep. at p. 34). WRCS official Foley, who was present during the interview, agreed that Hedrick was overqualified. (Foley Dep. at p. 14).

Hedrick testified that WRCS officials "understood" that to offer the job would be unreasonable "because of [her] education and the years [of] experience," and "[i]t became a consensus at that point in time that I was overqualified."

(Hedrick Dep. at p. 36). Hedrick testified "they basically had talked me out of the position." (Hedrick Dep. at p. 73). There was simply no offer in light of Hedrick's and WRCS officials' conclusion that the position was not suitable. At the very least, there is a disputed issue of fact concerning whether Hedrick refused the Scheduler job.

2. Ignoring the testimony of WRCS officials that the position was not suitable, the court found that the Scheduler position was a reasonable accommodation. Again, it was WRCS officials who recognized that the Scheduler job was not suitable in light of Hedrick's education and long experience as a Staff Nurse. That factual issue should not have been resolved on a summary judgment.

Though not discussing the nature of the Scheduler position, the court below observed:

> "Although Hedrick asserts that she was overqualified for the referral center scheduler position because she was a registered nurse, WRCS eventually filled the position with a registered nurse who, like Hedrick, was coming off of a disability leave." 355 F.3d at 458.

The registered nurse referred to in the decision who accepted the Referral Center Scheduler position was Susan Burnham-Ezzo. The court below made no mention of Burnham-Ezzo's affidavit, submitted with the summary judgment motion papers, in which she stated that she also was told by WRCS

that she was overqualified for the Scheduler position. In her affidavit, Burnham-Ezzo made it clear that she accepted the job out of desperation and resigned shortly afterward to take a position paying a salary commensurate with her training.

Whether the Scheduler position was "reasonable" is an issue of fact precluding judgment as a matter of law. Again, it was WRCS officials who recognized that the Scheduler job was not suitable in light of Hedrick's education and long experience as a Staff Nurse. That factual issue should not have been resolved on a summary judgment.

3. The same month the Scheduler position became vacant, there was an opening for a Quality Assessment Clinician position. The existence of other vacant positions was an additional reason a jury could conclude that the Scheduler job was not a reasonable accommodation.

In Norville v. Staten Island University Hospital, 196 F.3d 89 (2nd Cir. 1999), the court held that "the law is clear that an offer of an inferior position does not constitute a reasonable accommodation where a position with salary and benefits comparable to those of the employee's former job is available." 196 F.3d at 100. That court continued:

> "The jury thus might conclude that the positions to which the hospital proposed reassigning Norville were not 'comparable' within the meaning of the ADA. Moreover, Norville met her burden of creating a jury question as to whether a comparable job was available. The radiology nurse position was

> vacant, and, as discussed above, the record displays a genuine factual dispute regarding her qualifications for that job." 196 F.3d at 100.

In addition to WRCS staff suggesting that the Scheduler job was not reasonable for a long-term experienced nursing employee, the existence of a more suitable position also shows that the Scheduler job was not a reasonable accommodation.

When the six vacant positions were staffed, Hedrick was placed on the ADA List created and maintained by WRCS. The notion that discussing the Scheduler job relieved WRCS of the duty to appoint Hedrick to other available positions should have been rejected by the court below.

The court below did not address whether the Scheduler job was a suitable accommodation. Had the court undertaken an inquiry, it could well have concluded, as did the WRCS officials, that Hedrick was overqualified for the Scheduler position. Even if it had been offered, Hedrick's claimed failure to accept the Scheduler position did not relieve the WRCS from its statutory duty to provide a reasonable accommodation.

The court below did not address the issue of whether Hedrick was disabled, but grounded its decision on the belief that Hedrick was not a qualified individual with a disability because she did not accept the Scheduler position. That conclusion rests on the lower court's resolving disputed issues of fact contrary to this Court's standards for summary judgment.

IV. REVIEW IS APPROPRIATE TO CONSIDER WHETHER THE CLAIM THAT A BETTER APPLICANT WAS CHOSEN SATISFIES AN EMPLOYMENT DISCRIMINATION DEFENDANT'S DUTY TO PROVIDE A NON DISCRIMINATORY REASON FOR THE CHALLENGED EMPLOYMENT DECISION, AND WHETHER, IF SUCH A CLAIM IS MADE, A COURT IS REQUIRED TO CONSIDER THE RELATIVE QUALIFICATIONS OF THE APPLICANTS

In 1973, Joanne Hedrick was employed as a Staff Nurse by WRCS. WRCS acknowledged the ability of the experienced Hedrick to perform her nursing duties. Beginning in September of 1996, WRCS staffed vacant nursing positions. WRCS never claimed that Hedrick was unqualified for the positions, but selected younger, less experienced employees.

Joanne Hedrick, who was born in 1948, asserted an age discrimination claim. The claim was grounded on the acknowledged fact that WRCS bypassed the senior, experienced and qualified Hedrick to assign vacant positions to younger, less experienced personnel.

In affirming, the court below discussed the trial court's findings:

> "...the district court found (and, in fact, WRCS conceded) that Hedrick had established a *prima facie* case of age discrimination. WRCS, then, offered a legitimate, non-discriminatory reason for not hiring Hedrick for one of the vacant case manager positions and/or quality assurance positions, i.e., WRCS asserted that it chose better qualified candidates than Hedrick to fill the vacant positions." 355 F.3d at 460.

A threshold issue is whether the stated non-discriminatory reason for the challenged employment decision was adequate. Under Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the employer "must clearly set forth... the reasons for the plaintiff's rejection." 450 U.S. at 255. Suggesting that an age discrimination plaintiff was not the most qualified applicant for the six vacant positions is a conclusion, not a specific reason for the challenged employment decision.

In this case, the district court and the appellate court simply accepted the employer's claim that better qualified employees were chosen for the vacant positions. There was never any discussion of the relative qualifications of Hedrick and the successful applicants. A more searching analysis was required. Such an analysis would have shown that WRCS did not select the more qualified applicant.

One of the challenged employment decisions, not discussed below, is illustrative. A Case Manager position was staffed by Barbara Sanders. The staffing decision was

made by Dr. Paul Bunn, Chairman of WRCS Department of Medicine. In his deposition, Dr. Bunn:

- acknowledged that Sanders "had less experience in the system" than Hedrick;
- that Sanders was significantly younger than Hedrick;
- that there was nothing in Sanders' personnel file which evidenced "any special skills or qualities that you were looking for for this position"; and
- that Sanders' file does not show a strength in her activities and honors, and that while both Hedrick and Sanders had Bachelor's degrees in Nursing, Hedrick was working toward a Master's degree in health. (Bunn Dep. at pp, 39, 79-82 and Exhibit 19).

Yet Sanders, and not Hedrick, was recommended by Dr. Bunn for reasons which he characterized as "subjective." (Bunn Dep. at p. 31).

One of the quality assurance positions was given to Daniel Donatelli. WRCS claimed that Donatelli was chosen because he was working toward a Master's degree and had leadership and computer experience. Yet, the evidence demonstrated that Hedrick had far more supervisory (leadership) experience and was also working on her Master's degree. Hedrick also had far more nursing experience. Indeed, Donatelli was a decade younger and had eighteen (18) fewer years of hospital experience.

A jury could well conclude that the stated reason that Sanders and Donatelli were "better qualified" is pretextual. In ruling on the age discrimination claim, the lower courts

should have addressed the pretext issue with respect to Sanders, Donatelli and the other successful candidates.

The court below concluded:

> "...we find the district court correctly entered summary judgment in WRCS's favor on Hedrick's ADA claim because she failed to demonstrate, by a preponderance of the evidence, that WRCS's proffered reason for not hiring her for one of the vacant case manager and/or quality assurance positions was a pretext for age discrimination." 355 F.3d at 462.

The appellate court so ruled without any discussion of the challenged employment decisions. The court below simply accepted the claim that better qualified candidates were selected for the vacant positions without addressing the specifics of the challenged decisions.

V. REVIEW IS APPROPRIATE SINCE THE DECISION BELOW IS CONTRARY TO THIS COURT'S RULING IN REEVES V. SANDERSON PLUMBING PRODUCTS, INC. 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) REVIEW WOULD ALSO ALLOW THE COURT TO ADDRESS A SPLIT AMONG THE CIRCUITS CONCERNING THIS COURT'S DECISION IN REEVES.

The decision below states that "...the district court found (and, in fact, WRCS conceded) that Hedrick had established a *prima facie* case of age discrimination." 355 F.3d at 460.

The appellate court also acknowledged that Hedrick presented evidence of pretext. 355 F.3d at 461.

The lower court concluded, however, that WRCS was entitled to judgment as a matter of law since Hedrick "failed to demonstrate, by a preponderance of the evidence, that WRCS's proffered reason" for the challenged employment decisions was a pretext for age discrimination. 355 F.3d at 462. The ruling is contrary to this Court's decision in Reeves v. Sanderson Plumbing Prods., Inc., supra.

In Reeves,

> "...the Court of Appeals proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination." 530 U.S. at 146.

This Court reversed, explaining:

> "...a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." 530 U.S. at 148.

This Court concluded that "...because a *prima facie* case and sufficient evidence to reject the employer's explanation may

permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination." 530 U.S. at 149.

The court below recognized, but did not apply, the general rule laid out by this Court in Reeves. Rather, the court below focused on this Court's recognition in Reeves that there may be instances when a *prima facie* case and evidence of pretext is insufficient to preclude a summary judgment.

> "...the Supreme Court in Reeves anticipated just such a scenario: 'Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory.' Id. at 148..." 355 F.3d at 461.

In Reeves, this Court discussed such an example:

> "For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." 530 U.S. at 148.

Here, the employer simply claimed that better candidates were chosen for the vacant positions, and there was no "abundant

and uncontroverted independent evidence that no discrimination had occurred." There was no basis for not applying the general rule that an ADA plaintiff's *prima facie* case and evidence of pretext precludes a summary judgment.

In addition to discussing the limited instances where a plaintiff's *prima facie* case and evidence of pretext would not be sufficient to foreclose judgment as a matter of law, this Court addressed the procedure for making such a finding:

> "...the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence... [the court] must disregard all evidence favorable to the moving party that the jury is not required to believe." 530 U.S. at 151.

Simply accepting the employer's claim that better candidates were chosen for the vacant positions, and ignoring the specific employment decisions, hardly satisfies this Court's standard. Under the ruling below, the limited exception would nullify this Court's holding in Reeves.

Justice Ginsburg, concurring in Reeves, foresaw the possibility that this Court might need to revisit its holding in Reeves. Justice Ginsburg explained:

> "The Court today holds that an employment discrimination plaintiff *may* survive judgment as a matter of law by submitting two categories of evidence: first, evidence

> establishing a 'prima facie case,' as that term is used in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); and second, evidence from which a rational fact finder could conclude that the employer's proffered explanation for its actions was false." 530 U.S. at 154 (J. Ginsburg, conc.)

Evidence of pretext, the concurring Opinion explains, "gives rise to a rational inference" of discriminatory motivation, and

> "...the inference remains – unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law... that discrimination could not have been the defendant's true motivation." 530 U.S. at 154 (J. Ginsberg, conc.)

The concurring Opinion continues,

> "If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above." 530 U.S. at 154 (J. Ginsburg, conc.)

The concurring Opinion explains:

> "...it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two

> categories in order to survive a motion for judgment as a matter of law. I anticipate that such circumstances will be uncommon." 530 U.S. at 154 (J. Ginsburg, conc.)

This is an "appropriate case" for this Court to revisit and reaffirm its holding in Reeves.

Further, the application of Reeves has resulted in a split of authority among the Circuits.

In Dennis v. Columbia Colleton Medical Center, Inc., 290 F.3d 639 (4th Cir. 2002), the court explained the limited circumstances under which a *prima facie* case and evidence of pretext is insufficient to preclude judgment as a matter of law:

> "...while not exhaustive, the examples provided in Reeves do preclude us from ordering judgment as a matter of law when a defendant has merely made a lesser evidentiary showing of the very same factors they include. That is, such a judgment requires a more conclusive evidentiary showing... than the mere presentation of circumstances suggesting *possible* alternatives to both discrimination and its proffered nondiscriminatory reason... They also require more than the mere presentation of less than 'abundant' and 'uncontroverted' evidence that discrimination did not occur in combination with a weak showing of pretext by [the plaintiff]. To grant judgment as a matter of law under such circumstances would be to intrude on the jury function by substituting our own judgment for that of the finder of fact." 290 F.3d at 649-650.

In Blow v. City of San Antonio, Texas, 236 F.3d 293 (5th Cir. 2001), the court concluded that a *prima facie* case and evidence of pretext was sufficient to preclude judgment as a matter of law where "there are no unusual circumstances..." 236 F.3d at 298.

In Zimmermann v. Associates First Capital Corp., 251 F.3d 376 (2nd Cir. 2001), the court recognized a split among the Circuits:

> "Since Reeves, the case law has been developing as to what sort of a record will permit a plaintiff who presents evidence of a *prima facie* case and evidence of a pretext to have a jury consider the ultimate issue of discrimination and what sort of record will entitle a defendant to judgment as a matter of law. The Fifth Circuit appears to understand Reeves to mean that a *prima facie* case and evidence of pretext take a case to a jury in the absence of '*unusual circumstances* that would prevent a rational fact-finder from concluding that the employer's reasons for failing to promote her were discriminatory and in violation of Title VII.' Blow v. City of San Antonio, 236 F.3d 293, 298 (5th Cir. 2001) (emphasis added); *see also Evans v. City of Bishop*, 238 F.3d 586, 592 (5th Cir. 2000) (noting that the 'Supreme Court in Reeves emphasized the importance of jury fact finding and reiterated that evidence of the prima facie case plus pretext may, *and usually does*, establish sufficient evidence for a jury to find discrimination.'). (emphasis added) The

> Fourth Circuit has observed that if the plaintiff proves a *prima facie* case and pretext, her claim must go to a jury unless 'there is evidence that precludes a finding of discrimination.' Rowe v. Marley Co., 233 F.3d 825, 830 (4th Cir. 2000).
> Our Circuit has not read Reeves quite so favorably to Title VII plaintiffs." 251 F.3d at 381-382.

In addition to the reasons set out above, a review by this Court is appropriate to resolve the dispute among the Circuits concerning the application of Reeves.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

GREEN HAINES SGAMBATI CO., L.P.A.

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Table of Appendix Contents

6TH CIRCUIT FILING :

Opinion,
filed 01/09/04 ..... A1- A34

Order,
filed 03/04/04 ..... B1- B2

NORTHERN DISTRICT OF OHIO FILING:

Judgment Entry,
filed 06/27/02 ..... C1 - C2

OTHER:

Statutes ..... D1 - D4

Layman v. Alloway Stamping & Machine Company, Inc.,
2004 WL 719262 (6th Cir. (Tenn.)) ..... E1 - E20

APPENDIX A

HEDRICK v. WESTERN RESERVE CARE SYSTEM
355 F.3d 444
(1-9-04, Rehearing En Banc denied 3-4-04)

Pages A-1 through A-34

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Joanne HEDRICK,
Plaintiff - Appellant,
v.
WESTERN RESERVE CARE SYSTEM and Forum Health,
Defendants - Appellees.

No. 02-3898
Argued: October 21, 2003
Decided and Filed: January 9, 2004

Before: MARTIN and SUTTON, Circuit Judges; MILLS, District Judge.(*)

FILED
Jan. 9, 2004
Leonard Green, Clerk

COUNSEL

ARGUED: Ira J. Mirkin, GREEN, HAINES, & SGAMBATI, Youngstown, Ohio, for Appellant. Domenic A. Bellisario, LAW OFFICE, Pittsburgh, Pennsylvania, for Appellee.

ON BRIEF: Ira J. Mirkin, Barry R. Laine, GREEN, HAINES, & SGAMBATI, Youngstown, Ohio, for Appellant. Domenic A. Bellisario, LAW OFFICE, Pittsburgh, Pennsylvania, for Appellee.

*The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

OPINION

RICHARD MILLS, District Judge.

A suit alleging both *age* and *disability* discrimination.

Joanne Hedrick worked for Western Reserve Care System as a registered nurse for twenty-two years before taking a medical leave of absence. When she attempted to return to work, Hedrick alleged that Western Reserve Care System and its holding company, Forum Health, discriminated against her on account of her age, in violation of the Age Discrimination in Employment Act (29 U.S.C. § 621 *et seq.*), and on account of her disability, in violation of the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*) and Ohio Revised Code Chapter 4112.

Upon completion of discovery, the district court granted summary judgment in Western Reserve Care System's favor on all three of Hedrick's claims against it and denied Hedrick's motion for partial summary judgment.

We **AFFIRM** the judgment of the district court.

I. BACKGROUND

Joanne Hedrick was born on June 10, 1948. Hedrick received an associate's degree in nursing in 1973 and, thereafter, became employed as a general duty staff nurse by the Youngstown Hospital Association, *i.e.*, the predecessor of Western Reserve Care System ("WRCS"). As a general duty staff nurse, Hedrick performed typical bedside nursing functions for WRCS.

During the late 1980's, Hedrick was diagnosed as having osteoarthritis in her left knee. In the early 1990's, her condition progressed, and Hedrick was diagnosed as having and was treated for osteoarthritis in both knees. Since her initial diagnosis, Hedrick has been treated by her family physician, Dr. L. Kevin Nash, and by her orthopedic surgeon, Dr. Raymond Duffett.

On December 1, 1995, Hedrick fell and broke her leg which necessitated surgery (performed by Dr. Duffett) and a medical leave of absence from work in order to recuperate. On April 29, 1996, Dr. Duffett released Hedrick to return to work without any restrictions effective June 1, 1996.

However, on May 3, 1996, Hedrick visited Dr. Nash and expressed her reservations about her ability to return to work as a general duty staff nurse because she was concerned that she would be unable to perform her duties. Although he did not initially share Hedrick's reservations regarding her ability to return to work as a general duty staff nurse, Dr. Nash subsequently reversed his opinion and agreed that Hedrick would be unable to resume her bedside nursing duties. On July 1, 1996, Dr.

Nash wrote a letter to Sue Yoder, WRCS's director of nursing, in which he reported that "Ms. Joanne Hedrick has been making a very slow recovery after her devastating fracture of the left femur. Joanne has shared with me that she does not believe that she is going to be able to return to bedside nursing, and frankly I share her reservations."

On July 16, 1996, Hedrick underwent a functional capacity evaluation in order to determine her ability to return to work and, if it was determined that she was able to return to work, the limitations, if any, she would have. This evaluation indicated that Hedrick would be unable to return to her previous position as a general duty staff nurse at WRCS because of her physical limitations in bending and lifting and due to the pain in her knees. As a result of this evaluation, Dr. Nash wrote to Jon R. Steen, WRCS's human resources director, on August 7, 1996, and requested that Hedrick be considered for other positions.

In July or August 1996, Hedrick asked to be placed upon WRCS's list of employees who claimed to have permanent work restrictions[1].(1) This list was commonly referred to as the "ADA list." Once an employee was placed upon the ADA list, WRCS attempted to find suitable employment for those employees who could no longer perform the duties of their regular positions. On September 24, 1996, Dr. Nash wrote a letter to Steen regarding Hedrick's precise limitations and reported that Hedrick was able to conduct daily activities for short intervals, to walk short distances, and to stand, drive, and

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[1]WRCS would only place an employee on the ADA list upon that employee's request.

perform desk work for short periods of time. Upon receipt of Dr. Nash's letter and pursuant to her request, WRCS placed Hedrick on the ADA list, and subsequently, WRCS began identifying job vacancies which corresponded with Hedrick's background, skills, and medical restrictions.

In late September 1996, Ann Marie Ondo, WRCS's employment coordinator, informed Hedrick of an opening as a referral center scheduler. Hedrick interviewed for the position with Lorraine Nelson and Mary Pat Foley, and during the interview, one of the interviewers asked her about her physical limitations. Hedrick responded that she would be able to fully perform the job's requirements. However, upon learning of the salary, Hedrick indicated that she was not interested in the position because the salary was too low. Although it is unclear whether the position was formally offered to Hedrick, it is clear that Hedrick understood that the job was hers if she wanted it and that she specifically told Nelson and Foley that she would not take the position.

Later that same month, Ondo informed Hedrick of an open quality assurance position. Hedrick interviewed with Nelson for the position in November 1996, and, again, Nelson asked her about her physical limitations because the position involved some walking and lifting. Hedrick responded that she did not believe that her physical limitations would be an issue and that, although she may not walk as fast as others, she could get from point "A" to "B." Ultimately, WRCS selected an applicant other than Hedrick for the quality assurance position.

In January 1997, Ondo informed Hedrick of four case manager vacancies in the department of medicine. Hedrick interviewed for the positions with Dr. Paul Bunn who also asked her about her physical limitations because the positions entailed a fair amount of walking. Hedrick, again, responded that she would have no problems fulfilling the duties of the positions, and Dr. Bunn assured her that she would not be hired for her leg work and that the hiring decision would be based upon experience and knowledge. In February 1997, Ondo informed Hedrick that the four case manager positions were filled by other more qualified applicants.

About a week later, Ondo informed Hedrick that another qualify assurance position was vacant, and Hedrick expressed an interest in the job. Although Hedrick was initially scheduled for an interview in March 1997, Nelson advised her that she would not have to interview for the position because she had recently interviewed for another quality assurance position. In late March or early April 1997, Ondo advised Hedrick that she had not been selected for the position. Thereafter, Hedrick and Ondo continued to communicate regarding various vacancies at WRCS, but Hedrick was not interested in any of these vacancies.

In August 1997, Carol Olson contacted Hedrick regarding a temporary assignment as an admissions nurse. Hedrick accepted the position and returned to work with WRCS on August 25, 1997, at no loss of earnings or benefits.

After receiving a right to sue letter from the Equal Employment Opportunity Commission, Hedrick filed a timely suit against WRCS and its parent corporation,

Forum Health, in federal district court on March 17, 1999. Hedrick's Complaint contained three Counts: Count I alleged a cause of action pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.*; Count II alleged a cause of action pursuant to Ohio Revised Code Chapter 4112 which prohibits discrimination on the basis of handicap; and Count III alleged a cause of action pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*[2]

At the close of the discovery period, Hedrick moved for partial summary judgment on the issues of whether she was "disabled" within the meaning of the ADA and whether WRCS had failed to reasonably accommodate her disability. WRCS and Forum Health, in turn, moved for summary judgment on each of Hedrick's claims against them. The district judge referred the cross-motions for summary judgment to a magistrate judge who filed a report and recommendation which recommended that summary judgment be entered in WRCS and Forum Health's favor on all three of Hedrick's claims and also recommended that Hedrick's motion for summary judgment be denied.

Hedrick filed objections to the magistrate judge's report and recommendation with the district judge, but the district judge denied her objections, adopted the magistrate judge's report and recommendation, denied her motion for summary judgment, and entered summary judgment in WRCS and Forum Health's favor on all three Counts of

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[2]Hedrick filed an Amended Complaint on January 14, 2000, which did not alter her three causes of action.

Hedrick's Amended Complaint. Thereafter, Hedrick filed a timely notice of appeal.

II. ANALYSIS[3]

A. *STANDARD OF REVIEW*

We review a district court's order granting summary judgment *de novo*. *Equitable Life Assurance Soc'y v. Poe*, 143 F.3d 1013, 1015 (6th Cir. 1998). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). An issue of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

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Hedrick did not file an objection with the district court to the magistrate judge's recommendation that Forum Health was entitled to summary judgment or to the magistrate judge's finding that she had waived her disability claim based upon obesity by failing to assert it at the summary judgment stage. Likewise, Hedrick has not challenged on appeal the district court's dismissal of Forum Health or her disability claim based upon obesity, and thus, those issues are waived and are not before the Court.

242, 248 (1986). Determination of whether a fact is "genuine" requires consideration of the applicable evidentiary standard. *Id.* A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Id.* "Once the moving party satisfies its burden, 'the burden shifts to the nonmoving party to set forth specific facts showing a triable issue.'" *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir. 2001)(quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

As for Hedrick's motion for partial summary judgment, an order denying summary judgment ordinarily constitutes a non-appealable, interlocutory order. *Pacific Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305, 1306 (1977). However, because Hedrick's appeal is from a final judgment, the denial of her motion for partial summary judgment is reviewable. *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc.*, 173 F.3d 988, 992 (6th Cir. 1999). "We . . . review *de novo* a district court's order denying summary judgment, if the denial is based on purely legal grounds. If the denial is based on the district court's finding of a genuine issue of material fact, however, we review for abuse of discretion a district court's order denying summary judgment." *Black v. Roadway Express, Inc.*, 297 F.3d 445, 448 (6th Cir. 2002)(internal citations omitted).

B. *ADA CLAIM*[4]

The ADA provides, in relevant part, that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advance-ment, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). In order to establish a *prima facie* case of disability discrimination under the ADA, a plaintiff must establish that: "1) he is an individual with a disability;[5](5) 2) he is 'otherwise qualified' to perform the job requirements, with or without reasonable accommodation; and 3) he was [not hired] solely by reason of his handicap." *Monette v.*

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[4] Because the essential elements of an ADA claim and a claim under the Ohio handicap discrimination statute are identical, our analysis of Hedrick's ADA claim also resolves her state law claim. *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 938-39 (6th Cir. 2000); *Hoffman v. Fidelity Brokerage Servs., Inc.*, 959 F. Supp. 452, 457 n. 1 (S.D. Ohio 1997).

[5] Under the ADA, the term "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 193 (2002).

Electronic Data Sys. Corp., 90 F.3d 1173, 1178 (6th Cir. 1996) (footnote added)(citations omitted). A plaintiff may prove that he was discriminated against based upon his disability either through direct or indirect evidence. *Id.*

We have previously explained that in cases where the plaintiff presents direct evidence of disability discrimination:

> (1) The plaintiff bears the burden of establishing that he or she is disabled. (2) The plaintiff bears the burden of establishing that he or she is "otherwise qualified" for the position despite his or her disability: (a) without accommodation from the employer; (b) with an alleged "essential" job requirement eliminated; or (c) with a proposed reasonable accommodation. (3) The employer will bear the burden of proving that a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship upon the employer.

Monette, 90 F.3d at 1186. When a plaintiff seeks to establish his case indirectly, however, the *McDonnell Douglas* burden-shifting approach applies so that the

> plaintiff may establish a *prima facie* case of discrimination by showing that: (1) he or she is disabled; (2) otherwise qualified for the position, with or without reasonable accommodation; (3) suffered an adverse employment decision; (4) the employer knew or had reason to know of the plaintiff's disability; and (5) the position remained open while the employer sought other applicants or the disabled individual was replaced. The defendant must then offer a legitimate

> explanation for its action. If the defendant satisfies this burden of production, the plaintiff must introduce evidence showing that the proffered explanation is pretextual. Under this scheme, the plaintiff retains the ultimate burden of persuasion at all times.

Id. at 1186-87; *Walsh v. United Parcel Serv.*, 201 F.3d 718, 724-25 (6th Cir. 2000).

As this Court recognized in *Kline v. Tennessee Valley Auth.*, 128 F.3d 336 (6th Cir. 1997), "[t]he direct evidence and circumstantial evidence paths are mutually exclusive; a plaintiff need only prove one or the other, not both. If a plaintiff can produce direct evidence of discrimination then the *McDonnell Douglas-Burdine* paradigm is of no consequence. Similarly, if a plaintiff attempts to prove its case using the *McDonnell Douglas-Burdine* paradigm, then the party is not required to introduce direct evidence of discrimination." *Id.* at 348-49.

As the district court correctly noted, the crux of Hedrick's Amended Complaint against WRCS is that WRCS unlawfully discriminated against her by failing to award her one of the four case manager positions or one of the two quality assurance positions for which she applied. Hedrick argues that she established her *prima facie* case of disability discrimination under the ADA *via* both the direct and the indirect method.

1. *Direct Evidence*

a. *Arguments*

As for her direct evidence of disability discrimination, Hedrick relies upon the testimony of Dr. Nash who testified that Nelson "expressed concern to me that she felt that [Hedrick's] medical condition would prohibit her from being able to perform this job as case manager." Hedrick contends that the district court erred in rejecting this direct evidence of disability discrimination–as grounds for denying WRCS's motion for summary judgment–for two reasons.

First, Hedrick asserts that the district court erred in requiring her to establish that she was denied one of the vacant job positions for which she applied solely because of unlawful disability discrimination. Although she acknowledges that *Monette* and its progeny hold that an ADA plaintiff must establish that the adverse employment action occurred "solely by reason of his handicap," *Monette*, 90 F.3d at 1178, Hedrick claims that this holding is no longer good law. Rather, Hedrick argues that all she needed to show in order to establish her *prima facie* case under the ADA was that discriminatory animus played a part in WRCS's hiring decision, not that it was the sole reason.

Second, Hedrick contends that, contrary to the district court's conclusion, Dr. Nash's testimony regarding Nelson's statement to him created a genuine issue of material fact sufficient to deny WRCS's motion for summary judgment. Hedrick asserts that the district court erred in holding that the direct evidence standard requires a

defendant's admission in order to constitute direct evidence of disability discrimination. On the contrary, Hedrick claims that this Court's opinion in *Ross v. Campbell Soup Co.*, 237 F.3d 701 (6th Cir. 2001), establishes that isolated comments may constitute direct evidence of disability discrimination sufficient to defeat a defendant's summary judgment motion. Accordingly, Hedrick asks us to reverse the district court's grant of summary judgment against her.

b. *Conclusions*

We find that the district court did not err in finding Hedrick's direct evidence of disability discrimination insufficient to withstand WRCS's summary judgment motion. While it is true (as cited by Hedrick) that some of our sister circuits have held that an ADA plaintiff need not demonstrate that disability was the sole reason for the adverse employment action but only that it played a motivating role in the decision, *e.g.*, *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 337 (2d Cir. 2000), *Monette* and *Walsh* remain good law in this circuit, and we are bound by this authority. *See McLeod v. Parsons Corp.*, 2003 WL 22097841, * 11 (6th Cir. Sept. 5, 2003)("We decline McLeod's request that this panel permit plaintiffs to recover under the ADA in mixed motive cases. Adopting the approach followed by several other circuits would require the panel to make a substantial departure from this Court's holdings in *Walsh* and *Monette*. Under *Salmi v. Secretary of Health and Human Services*, 774 F.2d 685, 689 (6th Cir. 1985), one panel of this Court cannot reverse the holding of another panel unless there is a contrary Supreme Court decision or *en banc* decision by this Court. *Id.*"). Accordingly, the district court did not err in requiring Hedrick to show that her disability was the sole reason for

WRCS's decision not to hire her for one of the four case manager positions or one of the two quality assurance positions for which she applied.

Furthermore, we agree that *Ross* is distinguishable from the instant case. In *Ross*, we held that the district court erred in dismissing, as isolated and insufficient to constitute direct evidence of discriminatory animus, a memorandum which referred to the plaintiff as a "back case." *Ross*, 237 F.3d at 706-07. Although it is true that the *Ross* court concluded "that the district court too easily dismissed the 'back case' memo as direct evidence of discrimination by the employer," *id.* at 707, when viewed in the entire context of the case and of the court's opinion, it is clear that the back memorandum was but one event in a series of comments and reports which, when taken cumulatively, was sufficient to create a genuine issue of material fact precluding summary judgment. Here, Hedrick has tendered no series of comments or reports which would indicate WRCS's discriminatory animus, and thus, Nelson's comment to Dr. Nash may properly be characterized as isolated and insufficient to create a genuine issue of material fact regarding WRCS's discriminatory intent.

In addition, the plaintiff in *Ross* tendered the memorandum in order to establish that his employer regarded him as being disabled, and the *Ross* court held that the memorandum, when viewed in combination with other evidence, was sufficient to create a genuine issue of material fact with regard to that element. *See id.* at 706 ("We conclude that Ross has presented sufficient evidence to create a genuine issue of material fact concerning his claim that the company regarded him has [*sic*] a person

with a disability within the meaning of the Act. Perhaps the piece of evidence most indicative of this fact is the 'back case' memo . . . ."); *see also id.* at 707 ("That the note's author would think to identify Ross with the scrawled post-script 'back case' demonstrates that there is at least a genuine issue of material fact that Campbell Soup Co. regarded Ross through the lens of his medical condition."). In the instant case, Hedrick tendered Nelson's statement to Dr. Nash in an attempt to tender direct evidence of WRCS's discriminatory animus sufficient to establish her *prima facie* case under the ADA, not merely to establish that WRCS regarded her as being disabled.[6]

Finally, the *Ross* memorandum is distinguishable in that the memorandum's tone was clearly discriminatory, *see id.* ("Not only does the note identify Ross as a 'problem person,' a comment which cannot be taken in a positive light, but it also identifies him as a 'back case.' The ADA was enacted, in part, to eliminate the sort of stereotyping that allowed employers to see their employees primarily as their disabilities and not as persons differently abled from themselves."), while Nelson's comment to Dr. Nash was clearly an expression of concern for Hedrick's ability to perform the jobs' requirements which included a fair amount of walking. Accordingly, we agree with the district court that Hedrick failed to tender any direct evidence in support of her ADA claim against WRCS.

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[6] In any event, as will be discussed *infra*, Hedrick has failed to show that she is a "qualified individual with a disability." 42 U.S.C. § 12111(8).

2. *Indirect Evidence*

a. *Arguments*

As for her indirect evidence of disability discrimination, Hedrick argues that only the first two elements of her *prima facie* case are in dispute because it is undisputed that she satisfied elements three, four, and five. She suffered an adverse employment decision (*i.e.*, she was not hired for one of the four vacant case manager positions and/or for one of the two quality assurance positions); WRCS knew of her disability; and the positions remained open while WRCS sought other applicants, and non-disabled applicants were chosen for the positions rather than her. Hedrick asserts that the district court erred in concluding that she did not show the existence of a genuine issue of material fact as to the first two elements of her *prima facie* case, and therefore, she asks us to reverse the district court's summary judgment order.

Regarding the first element of her *prima facie* case, Hedrick argues that her osteoarthritis in her knees constitutes a "disability," as that term is defined in the ADA, (1) because her condition is a physical impairment which substantially limits her major life activities of walking and working; (2) because she has a record of having such an impairment; and (3) because WRCS regarded her as having a disabling impairment. 42 U.S.C. § 12102(2); *Toyota Motor Mfg.*, 534 U.S. at 193.

First, Dr. Nash testified that, in his medical opinion, Hedrick's osteoarthritis in her knees rendered her disabled within the meaning of the ADA and that her condition is severe and permanent. Dr. Nash also testified that Hedrick

could not perform a broad range of nursing jobs due to her limited ability to work and walk– both of which are considered to be major life activities under the ADA.

Second, Hedrick contends that Dr. Nash's correspondence with WRCS, her functional capacity evaluation, and the fact that she was on WRCS's ADA list establish that she had a record of having a disabling impairment and, taken individually or collectively, constitute sufficient evidence to create a genuine issue of material fact as to whether she is disabled.

Third, Hedrick claims that WRCS regarded her as having a disabling impairment and that the district court erred in holding otherwise. In support of her argument, Hedrick notes that WRCS agreed that she could not resume her general duty staff nurse position due to her condition, that WRCS placed her on its ADA list, and that WRCS asked her about her physical limitations during several of her interviews. Accordingly, Hedrick argues that a genuine issue of material fact existed regarding whether she was "disabled" within the meaning of the ADA and that the district court committed reversible error in finding her not to be disabled.

Regarding the second element of her *prima facie* case, Hedrick contends that WRCS did not provide her with a reasonable accommodation as required under the ADA. Specifically, Hedrick claims that the district court erred in concluding that the referral center scheduler position was a reasonable accommodation which satisfied WRCS's obligations under the ADA and, as a result, erred in ruling that she was not "a qualified individual with a disability."

In making this finding, Hedrick asserts that the district court resolved disputed issues of fact which were not properly determinable on summary judgment: the district court found that WRCS offered Hedrick the referral center scheduler position, that she refused it, and that the referral center scheduler position was a reasonable accommodation. Because genuine issues of material fact existed regarding the first two elements of her *prima facie* case, Hedrick argues that the district court committed reversible error in entering summary judgment against her on her ADA claim.

b. *Conclusions*

We find that the district court did not err in entering summary judgment in WRCS's favor because Hedrick did not satisfy her *prima facie* case of disability discrimination under the *McDonnell Douglas* burden-shifting method. In reaching this conclusion, we need not resolve the thornier issue of whether Hedrick was "disabled" under the ADA because it is clear that, even assuming that she was disabled, she was not a qualified individual with a disability. Accordingly, we affirm the district court.

"A 'qualified individual with a disability' is defined as 'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.'" *Black*, 297 F.3d at 448 (quoting 42 U.S.C. § 12111(8)); *see* 29 C.F.R. § 1630.2(m)("Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and

who, with or without reasonable accommodation, can perform the essential functions of such position."). As we have previously explained:

> To recover under the ADA, a plaintiff must do more than show that he is "disabled" within the meaning of the statute. He must also establish that he is a "qualified individual with a disability" by showing: (1) that he "satisfies the prerequisites for the position [he holds or desires], such as possessing the appropriate educational background, employment experience, [and] skills . . ."; and (2) that he "can perform the essential functions of the position held or desired, with or without reasonable accommodation."

Burns v. Coca-Cola Enter., Inc., 222 F.3d 247, 256 (6th Cir. 2000)(quoting *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 676 (7th Cir. 1998)).

> "A disabled employee who claims that he or she is otherwise qualified with a reasonable accommodation 'bears the initial burden of proposing an accommodation and showing that that accommodation is objectively reasonable.'" *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633-34 (6th Cir. 1998)(quoting *Monette*, 90 F.3d at 1183). An employer, then, has the burden of persuasion to show that an accommodation would impose an undue hardship. *Id.* at 634; *Monette*, 90 F.3d at 1184.

> Although a "reasonable accommodation" may include reassignment to a vacant position, 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii), an employer need not reassign a disabled employee to a position for which he is not qualified, nor is the employer required to

waive legitimate, non-discriminatory employment policies or displace other employees' rights in order to accommodate a disabled employee. *Burns*, 222 F.3d at 257. On the contrary,

> [a]ccording to the regulations, an employer need only reassign a disabled employee to a vacant position. Employers are not required to create new jobs, displace existing employees from their positions, or violate other employees' rights under a collective bargaining agreement or other non-discriminatory policy in order to accommodate a disabled individual.

Id. (internal citations omitted).

Furthermore, in order to satisfy its duty under the ADA, an employer is only required to transfer an employee to a position comparable to the employee's prior position. *Hoskins v. Oakland County Sheriff's Dep't*, 227 F.3d 719, 728 n. 3 (6th Cir. 2000). "The regulations instruct that employers 'should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time,' and should only reassign an individual to a lower graded position if the individual cannot be accommodated in an equivalent position. 29 C.F.R. pt. 1630, App. § 1630.2(o)." *Id.* The ADA does not require an employer to offer an employee a promotion as a reasonable accommodation, *Cassidy*, 138 F.3d at 634, and "an employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided." *Hankins v. The Gap, Inc.*, 84 F.3d 797, 800-01 (6th Cir. 1996)(citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986)). In fact, where a

comparable position is not vacant, an employer's obligation to reassign an employee may include an assignment to a position with a lower grade of pay if the employee meets the job's qualifications. *Cassidy*, 138 F.3d at 634.

Finally, the regulations indicate that, although an employee is not required to accept an offered accommodation, if an individual rejects a reasonable accommodation, the individual will no longer be considered a qualified individual with a disability. *Hoskins*, 227 F.3d at 728 n. 3; *Hankins*, 84 F.3d at 801. Specifically, 29 C.F.R. § 1630.9(d) provides:

> A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

Id.

In the instant case, we agree with the district court that the referral center scheduler position was a reasonable accommodation and that Hedrick cannot be considered a qualified individual with a disability based upon her rejection of that position. As noted *supra*, although it is unclear whether WRCS formally offered the position to Hedrick, it is clear, based upon her own deposition

testimony, that Hedrick understood that the job was hers if she wanted it and that she preemptively rejected the position by informing Nelson and Foley that she would not take the position because of its low salary:

> A. I stated that I expected the cut in salary when I came back; but I did not expect that drastic of a cut when I came back.
>
> * * *
>
> A. It became a consensus at that point in time that I was overqualified. And I told them I would not take the position.
>
> Q. You said you would not take the position had they offered it to you?
>
> A. I assumed if they would have offered to me that with my – I just made the statement that I wasn't interested in that position at that point in time because I did not think it was for me.
>
> Q. And is the reason that you didn't think it was for you because of the salary?
>
> A. Yes.

Thus, although Hedrick may have personally believed that she was overqualified for the position and that the salary was too low, WRCS satisfied its obligation under the ADA by offering a reasonable accommodation when it made the referral center scheduler position available to her.

In addition, we agree with the district court that the referral center scheduler position was comparable to her previous position and that the four case manager positions and the two quality assurance positions were neither vacant nor comparable. Although Hedrick asserts that she was overqualified for the referral center scheduler position because she was a registered nurse, WRCS eventually filled the position with a registered nurse who, like Hedrick, was coming off of a disability leave.

Likewise, although it is true that one of the quality assurance positions became available just nine days after the referral center scheduler position became available, it is also true that the quality assurance positions were not comparable to her previous position because they were salaried, non-bargaining positions which would have constituted a promotion. As such, WRCS had no duty to offer the quality assurance positions to Hedrick. *Cassidy*, 138 F.3d at 634. As for the case manager positions, although the jobs would not have constituted a promotion, the record reflects that they did not become available until well after the referral center scheduler position became available, and Hedrick presented no evidence to establish that WRCS knew that these positions would soon become available when it offered her the referral center scheduler position.[7]

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[7] WRCS offered Hedrick the referral center scheduler position in September 1996, and the case manager positions became available in December 1996.

Finally, contrary to Hedrick's argument, her disability did not provide her with a preference in WRCS's hiring practices. Although WRCS may have had an obligation to reassign her to a vacant position for which she was qualified, the ADA does not mandate that she be afforded preferential treatment. *E.g.*, *Burns*, 222 F.3d at 258 (quoting *Dalton*, 141 F.3d at 679)("Allowing Burns to recover despite his failure to abide by KCC's non-discriminatory policy requiring him to apply for a transfer to a new position within his restrictions would 'convert a nondiscrimination statute into a mandatory preference statute, a result which would be inconsistent with the nondiscriminatory aims of the ADA.'"); *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995)("we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less."); *Terrell v. USAir, Inc.*, 132 F.3d 621, 627 (11th Cir. 1998)("We cannot accept that Congress, in enacting the ADA, intended to grant preferential treatment for disabled workers.").

Accordingly, we find that the district court correctly entered summary judgment in WRCS's favor on Hedrick's ADA claim because she failed to tender direct evidence of disability discrimination sufficient to withstand WRCS's summary judgment motion, because she cannot be considered a qualified individual with a disability based upon her rejection of the proffered referral center scheduler position, and because WRCS satisfied its obligations under the ADA of offering a reasonable accommodation to

Hedrick by making the referral center scheduler position available to her.

C. *ADEA CLAIM*

The ADEA provides in relevant part: "It shall be unlawful for an employer– (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Like the ADA, a plaintiff attempting to establish a claim under the ADEA may do so by producing either direct evidence, or he may rely upon the *McDonnell Douglas* burden-shifting method. *Kline*, 128 F.3d at 348-49; *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 n. 4 (6th Cir. 1992).

Moreover, like her ADA claim, the gist of Hedrick's ADEA claim is that WRCS discriminated against her by failing to award her one of the case manager positions and/or one of the quality assurance positions for which she applied.[8] However, unlike her ADA claim, Hedrick acknowledges that she cannot produce any direct evidence in support of her ADEA claim. Accordingly, Hedrick has attempted to establish her ADEA claim pursuant to the indirect method.

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[8] WRCS filled one of the case manager positions with an individual older than Hedrick, and so, she does not complain of the denial of this position with regard to her ADEA claim.

In order to establish a *prima facie* case of age discrimination pursuant to the *McDonnell Douglas* burden-shifting method,

> a plaintiff must establish that: (1) he was at least 40 years old at the time of the alleged discrimination; (2) he was subjected to an adverse employment action; (3) he was otherwise qualified for the position; and (4) after he was rejected, a substantially younger applicant was selected. *See Barnett v. Dep't of Veterans Affairs*, 153 F.3d 338, 341 (6th Cir. 1998). If the plaintiff successfully establishes a *prima facie* case, the burden of production shifts to the defendant to articulate a non-discriminatory reason for its action. *See id.* If the defendant comes up with such a reason, the plaintiff must then demonstrate by a preponderance of the evidence that the defendant's proffered reason was a pretext for age discrimination. *See id.*

Burzynski v. Cohen, 264 F.3d 611, 622 (6th Cir. 2001). Moreover,

> [i]n *Manzer*, a case brought under the ADEA, this Court explained what evidence a plaintiff must adduce in order to show that an employer's alleged legitimate reason for its adverse action against the plaintiff was a mere pretext:
>
> > To make a submissible case on the credibility of his employer's explanation, the plaintiff is required to show by a preponderance of the evidence either (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were

insufficient to motivate discharge. The first type of showing is easily recognizable and consists of evidence that the proffered bases for the plaintiff's discharge never happened, *i.e.*, that they are factually false. The third showing is also easily recognizable and, ordinarily, consists of evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff. These two types of rebuttals are direct attacks on the credibility of the employer's proffered motivation for firing plaintiff and, if shown, provide an evidentiary basis for what the Supreme Court has termed "a suspicion of mendacity."

The second showing, however, is of an entirely different ilk. There, the plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct could motivate dismissal. The plaintiff's attack on the credibility of the proffered explanation is, instead, an indirect one. In such cases, the plaintiff attempts to indict the credibility of his employer's explanation by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the defendant. In other words, the plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it "more likely than not" that the employer's explanation is a pretext, or a coverup.

> Accordingly, we hold that, in order to make this type of rebuttal showing, the plaintiff may not rely simply upon his *prima facie* evidence but must, instead, introduce additional evidence of age discrimination.

Manzer, 29 F.3d at 1084.

Pennington v. Western Atlas, Inc., 202 F.3d 902, 909-10 (6th Cir. 2000).

In the case *sub judice*, the district court found (and, in fact, WRCS conceded) that Hedrick had established a *prima facie* case of age discrimination. WRCS, then, offered a legitimate, non-discriminatory reason for not hiring Hedrick for one of the vacant case manager positions and/or quality assurance positions, *i.e.*, WRCS asserted that it chose better qualified candidates than Hedrick to fill the vacant positions. Finally, the district court found that Hedrick had failed to show that WRCS's proffered reason for not hiring Hedrick was pretextual.

1. *Arguments*

Hedrick argues that the district court's finding regarding pretext was erroneous. Specifically, Hedrick contends that the district court improperly applied the United States Supreme Court's holding in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), and that the district court disregarded the evidence of pretext which she tendered, choosing instead to blindly accept WRCS's subjective determination that the successful applicants were better qualified than she was without

conducting any analysis of that claim.[9] Accordingly, Hedrick asks us to reverse the district court's summary judgment order with regard to her ADEA claim because genuine issues of material fact exist as to whether WRCS's proffered reason for refusing to hire her for one of the vacant case manager and/or quality assurance positions was pretextual.

2. *Conclusions*

We find that the district court did not err in holding that Hedrick failed to demonstrate, by a preponderance of the evidence, that WRCS's proffered reason for not hiring her for one of the vacant case manager and/or quality assurance positions was a pretext for age discrimination and, therefore, did not err in entering summary judgment against Hedrick on her ADEA claim.

Contrary to her assertion otherwise, we do not believe that the district court improperly applied the Supreme Court's holding in *Reeves* by requiring her to produce additional evidence of discrimination beyond the evidence necessary to cast doubt on the genuineness of WRCS's asserted reason for not hiring her. A close reading of the district court's summary judgment order reveals that

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Hedrick's evidence of pretext consisted of the following: (1) the interviewers' memories had faded, and no notes existed which revealed how they came to their decisions; (2) it is unclear who made the employment decisions; (3) her own testimony established that she was the most qualified candidate; and (4) WRCS hired individuals younger than she.

the district court did not require Hedrick to satisfy a "pretext plus" standard; rather, the district court specifically stated that "[e]ven if WRCS's proffered reason were disbelieved, the evidence Hedrick presents does not support an inference that age discrimination was the motivating factor in WRCS's hiring decision." Thus, the district court concluded that, even though Hedrick had established a *prima facie* case under the ADEA, and even if the district court assumed that Hedrick provided sufficient evidence to show that WRCS's asserted justification was false, Hedrick's evidence was insufficient to avoid summary judgment, and the Supreme Court in *Reeves* anticipated just such a scenario: "Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.* at 148.

As for Hedrick's argument that the district court improperly disregarded her evidence of pretext, it is true that the district court could have done a more thorough job of discussing Hedrick's proffered evidence, especially given the fact that WRCS's justification for its employment decision was subjective, and subjective reasons provide "ready mechanisms for discrimination." *Grano v. Department of Dev. of City of Columbus*, 699 F.2d 836, 837 (6th Cir. 1983). However, we ultimately agree with the district court that Hedrick's evidence of pretext was insufficient to withstand summary judgment.

"The isolated fact that a younger person eventually replaces an older employee is not enough to permit a rebuttal inference that the replacement was motivated by age discrimination." *Chappell v. GTE Prods. Corp.*, 803

F.2d 261, 267 (6th Cir. 1986)(citing *LaMontagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1413 (7th Cir. 19084). Moreover, Hedrick's subjective view of her qualifications in relation to those of the other applicants, without more, cannot sustain a claim of discrimination. *Johnson v. United States Dep't of Health and Human Servs.*, 30 F.3d 45, 47-48 (6th Cir. 1994); *see Mitchell*, 964 F.2d at 584 (holding that the plaintiff's subjective skepticism regarding the truth of an employer's representation does not raise a triable issue as to pretext).

Finally, "[a]lthough the reason[] proffered by [WRCS] involve[d] subjective factors, [it was] clearly sufficient to dispel the inference of discrimination and to afford [Hedrick] a 'full and fair opportunity' to show pretext." *Daniels v. Board of Educ. of Ravenna City Sch. Dist.*, 805 F.2d 203, 209 (6th Cir. 1986)(citing *Page v. Bolger*, 645 F.2d 227, 228, 230 (4th Cir. 1981)(*en banc*)). As we have oft times repeated, "it is inappropriate for the judiciary to substitute its judgment for that of management." *Smith v. Leggett Wire Co.*, 220 F.3d 752, 763 (6th Cir. 2000); *see Krenik v. County of Le Sueur*, 47 F.3d 953, 960 (8th Cir. 1995)(holding that federal courts do not sit as a "super-personnel department"); *see also Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991)(same). "Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior." *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 973 (8th Cir. 1994) (quoting *Elrod*, 939 F.2d at 1470); *see Simms v. Oklahoma ex rel. Dep't of Mental Health and Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999)("Our role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second guesses employers' business judgments.").

Accordingly, we find that the district court correctly entered summary judgment in WRCS's favor on Hedrick's ADEA claim because she failed to demonstrate, by a preponderance of the evidence, that WRCS's proffered reasons for not hiring her for one of the vacant case manager and/or quality assurance positions was a pretext for age discrimination.

III. CONCLUSION

Accordingly, for the reasons set forth above, we **AFFIRM** the district court's grant of summary judgment for WRCS *in toto*. Because we affirm the district court's grant of WRCS's motion for summary judgment, we also **AFFIRM** the district court's denial of Hedrick's motion for partial summary judgment.

APPENDIX B

ORDER
[DENYING PETITION FOR REHEARING]

Sixth Circuit Case No. 02-3898
Filed March 4, 2004

Pages B-1 through B-2

No. 02-3898

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOANNE HEDRICK	)	
Plaintiff-Appellant	)	
v.	)	**ORDER**
WESTERN RESERVE	)	
CARE SYSTEM, et al.	)	
Defendants-Appellees	)	

FILED
March 4, 2004
Leonard Green, Clerk

BEFORE: MARTIN and SUTTON, Circuit Judges; and MILLS,[2] District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

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[2]Hon. Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

APPENDIX C

JUDGMENT ENTRY

United States District Court
for the Northern District of Ohio, Eastern Division
Case No. 4:99 CV 630
Filed June 27, 2002

Pages C-1 through C-2

UNITED STATE DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOANNE HEDRICK	)	**CASE NO. 4:99 CV 0630**
Plaintiff	)	
-vs-	)	**JUDGE LESLEY WELLS**
WESTERN RESERVE	)	
CARE SYSTEM, et al.	)	**JUDGMENT ENTRY**
Defendants	)	

This Court, having previously entered its memorandum of opinion and order granting Western Reserve Care System and Forum Health's motion for summary judgment, hereby enters judgment in favor of Defendants Western Reserve Care System and Forum Health and against Plaintiff Joanne Hedrick.

IT IS SO ORDERED.

/s/ Lesley Wells
UNITED STATES DISTRICT JUDGE

FILED
June 27, 2002
Clerk's Office
U.S. Dist. Ct.,
Northern Ohio

APPENDIX D

STATUTES
INCLUDING:

29 U.S.C. §623
29 U.S.C. §794
42 U.S.C. §2000e-2
42 U.S.C. §12111
42 U.S.C. §12112

Pages D-1 through D-4

29 U.S.C. §623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer–

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age...

29 U.S.C. §794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service...

42 U.S.C. §2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...

42 U.S.C. §12111. Definitions

As used in this subchapter:

* * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without **reasonable accommodation,** can perform the essential functions of the employment position that such individual holds or desires...

(9) **Reasonable accommodation**

The term **"reasonable accommodation"** may include–

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. §12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment...

APPENDIX E

LAYMAN v. ALLOWAY STAMPING &
MACHINE COMPANY, INC.
2004 WL 719262
(6TH Cir. (Tenn.))

Pages E-1 through E-20

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Seth LAYMAN,
Plaintiff - Appellant,
v.
ALLOWAY STAMPING & MACHINE COMPANY, INC.,
Aka Alloway's Stamping &
Manufacturing Company, Inc.,
Defendants - Appellees.

No. 01-6568
March 31, 2004

On Appeal from the United States District Court for the Eastern District of Tennessee.

David J. Fulton, Valerie H. Richardson, Wooden, Ray Fulton & Scarborough, Chattanooga, TN for Plaintiff-Appellant.

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Before: GUY, SUHRHEINRICH, and BATCHELDER, Circuit Judges

BATCHELDER, Circuit Judge.

Seth Layman ("Layman") appeals the judgment, entered after a jury trial, in favor of defendant Alloway Stamping & Machine Company, Inc. ("Alloway") on Layman's claim under the Americans with Disabilities Act, ("ADA") 42 U.S.C. §§ 12101-12213 (1994), for wrongful termination of his employment. Layman challenges specifically the jury instructions and the denial of a pre-trial motion *in limine*. Because we find the jury instructions either correctly stated the law or did not prejudice Layman, and because we find the trial court did not err in denying the motion *in limine*, we affirm the jury's verdict and the order of the district court.

I.

Seth Layman, a long-time employee of Alloway, suffered a serious injury resulting in the loss of four digits and most of the palm of his left hand in a accident that occurred while he was operating a press in the course of his employment on July 16, 1998. Layman succeeded in a worker's compensation suit, from which he received workers' compensation benefits and payment of medical expenses. In addition, Alloway voluntarily paid Layman the difference between his pre-injury earnings and the compensation he received under workers' compensation law; payment which exceeded that required under Tennessee law.

Prior to Layman's injury, the machine press had been equipped with safety devices, but an operator's failure to use those devices did not automatically result in termination of employment. Following Layman's injury, Alloway implemented written shop safety rules for machine press operation, requiring the use of safety restraints by machine press operators to assure that the operators' fingers and hands could not enter the press when the press could cycle, and prohibiting operators from placing their hands inside the machine press at any time when the press could cycle. The written rules explicitly stated that violation of these rules would result in immediate termination of employment:

> These rules apply to anyone operating a power press. These are rules, not suggestions. Your safety and employment are dependent on you following them. Improper operation of any one of the power presses will result in immediate termination of employment. In this event, we will mail you your check at the end of the week.

In May 1999, Layman returned to work at Alloway. On May 18, 1999, he was given a copy of the shop safety rules. Layman is a slow reader and does not like to read, but he reviewed the rules and signed a statement acknowledging that he had read and understood them.

Layman was able to perform his work after returning, and was commended by Scott Gill ("Gill"), the plant manager, for doing as good as the other workers were doing. One June 15, 1999, however, Layman was assigned to a task operating the same press that he had been operating at the time of his injury. After starting the task, he stopped to inform Gill that he did not believe that he could perform the function-specifically, he did not think that he would be able to run the bars through the press while guiding them with only one hand. He did not tell Gill that he could not perform the job if he had to use the safety restraints or follow the safety rules. Gill told him to return to the task, and that he would get ear protection required by the General Shop Rules and meet Layman at the machine. When Gill arrived at the machine with Nancy Alloway, who is a supervisor at Alloway, they observed Layman operating the machine without the safety restraints, and with his non-damaged right hand inside the machine's point of operation at the time when it could cycle. Layman was immediately terminated for violating the shop safety rules.

Layman filed this action on August 28, 2000, claiming a violation of the ADA. 42 U.S.C. § 12117. Alloway moved for summary judgment; the motion was denied; and the case proceeded to jury trial. Before the trial began, Layman filed a motion *in limine* asking the court to exclude all evidence regarding Layman's workers' compensation claim against Alloway. Alloway opposed

the motion and sought an order permitting it to introduce evidence that is had provided compensation to Layman during his rehabilitation in an amount greater than that required by Tennessee law. Alloway argued that his evidence was relevant to Layman's claim that Alloway discriminated against him because of his disability. The trial court ultimately dined Layman's motion and granted Alloway's.

At trial, Layman supported his claim of disparate treatment with evidence that prior to his termination, there had been a least two other rule violations that did not result in termination. The first involved Thomas Miller ("Miller"), who operated a machine with straps loose in violation of the policy. Gill testified that he decided to suspend rather than terminate Miller because he did not actually witness the violation but only had "circumstantial evidence" that a violation had occurred. Following Miller's violation and punishment, the employees were admonished that future violations would result in termination, and they were required to read and sign copies of the rules.

The second example Layman presented was Thomas Shepherd, who testified that he had been seen by Gill operating a machine without safety restraints after Layman's 1998 injury, and that Gill took no action except to admonish Shepherd to put on his restraints. The record supports Alloway's contention, however, that Shepherd

could not recall what time of year this event took place, and Shepherd specifically could not recall if this was before or after Miller's suspension, which triggered the requirement that all employees sign a copy of the new shop rules.

After hearing the proof at trial, the jury deliberated for 30 minutes before returning a verdict in favor of Alloway. Layman moved for a new trial pursuant to Federal Rule of Civil Procedure 59. The district court denied Layman's motion, and this appeal followed.

II.

A.

The district court offered the following instructions for the jury:

> The parties have stipulated that Mr. Layman is a qualified individual with a disability under the ADA. This means that he was disabled under the ADA and was capable of performing the tasks of his job with or without reasonable accommodation. Thus, the only issue in this case is the reason for Mr. Layman's termination.
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> In order to establish this claim of disability discrimination under the ADA, Mr. Layman must prove by a preponderance of the evidence that Alloway Stamping discarded him *solely because of his disability.*

(Emphasis added.) Layman argues that "the jury instructions incorrectly stated the elements Plaintiff was required to establish by a preponderance of the evidence." Specifically, Layman disputes that the appropriate standard to succeed on a ADA claim is "solely because of" disability. Before the trial court, however, Layman failed to object to the "solely because of" discrimination jury instruction, and we therefore review this objection for plain error only.

Objections to jury instructions are governed by Federal Rule of Civil Procedure 51, which provides that "[n]o party may assign as error the giving or the failure to give instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed.R.Civ.P.51 (2003) (amended Dec. 1, 2003). This court has found that in the absence of "an express objection" to a jury instruction, "we may consider any such error not objected to as waived, except where there is "plain error' or it 'required action by the reviewing court in the interests of justice." "*Chonich v. Wayne Co. Comm. Coll*, 973 F.2d 1271, 1275 (6th Cir. 1992); *accord Reynolds v. Green*, 184 F.3d 589, 594 (6th Cir. 1999).

Layman suggest that he did in fact object below on three occasions, but upon review none of his "objections" satisfy requirements of Rule 51 and *Chonich*. First, he suggest that he offered proposed jury instruction which did

not utilize the "solely" language, thereby "putting the trial court on notice that he objected to the trial court's Charge to the Jury." While it is true that Layman did not use the word "solely," he did use similarly limiting language in suggesting a jury instruction which stated "[i]f you find by a preponderance of the evidence that other employees were warned or suspended for the same violation the defendant states justifies its termination of Mr. Layman, you may find that discrimination was *the* motivating factor in his termination." (Emphasis added.) Had Layman really wished to object to the "solely" instruction, in addition to issuing an express objection, we think that he would have offered a jury instruction consistent with that objection - that is, one which states that under a set of conditions the juror may find "that discrimination was *a* motivating factor." Because his proposed instruction is actually consistent with the one to which he now objects, we cannot construe his first proposed jury instruction as an objection.

Layman next point to "Plaintiff's Objection to Jury Charge," in which Layman argued that "the proposed charge incorrectly states the law." This, however, is a blatant misrepresentation by omission of what Layman argued in his objection. The full sentence Layman quoted actually reads: "As grounds therefore, Plaintiff would state that the proposed charge incorrectly states the law, *specifically regarding pretext*." (Emphasis added.) If there was any question as to whether Layman intended "specifically regarding pretext" to refer to whether "solely

because of" was the appropriated standard, that question is answered by looking at the second proposed instruction attached, which includes the following language: "In order to establish his claim of disability discrimination under the ADA, LAYMAN must prove by a preponderance of the evidence that ALLOWAY STAMPING discharged him *solely because of* his disability." (Emphasis added.) Layman attempts unsuccessfully to overcome this damaging language by stating that "the trial court was well aware of the fact that the Plaintiff did not consider the 'solely' standard to be a correct statement of the law governing the ADA..." But that is just the point: Layman has failed to provide any evidence as to how the court was aware of his objection. We are left with his written language, and it is difficult indeed to see how an objection can recommend the very language which it is seeking to reject.

Layman finally argues that he did make an objection to the "solely" language by omitting "solely" from the pretext instruction. But the pretext instruction was in the paragraph following Layman's use of the term "solely because of." Counsel's construction does not even qualify as effective legerdemain.

Therefore, because Layman failed to object below to the "solely because of" standard, the objection is waived, except to the extent that the court below committed plain error, or to the extend that action is required by this court in

the interest of justice. *Chonich*, 973 F.2d at 1275. Because the district court relied upon clearly established Sixth Circuit precedent, the jury instruction do not constitute plain error.

Beginning in *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995), this court has found that the ADA parallels the protection of the Rehabilitation Act, and therefore this court essentially adopted in the ADA context the Rehabilitation Act's standard for a *prima facie* case. *Maddox*, 62 F.3d at 846 n. 2. Thus, to succeed on a claim under the ADA, a plaintiff must show: "(1) The plaintiff is a 'handicapped person' under the Act; (2) The plaintiff is 'otherwise qualified' for participation in the program; [and] (3) The plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his handicap."[1] *Id.* At 846. This standard was reaffirmed by *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996) (stating that to recover on a claim under the ADA, a plaintiff must establish the three elements discussed in *Maddox*, including prong three, the "solely by reason of" disability). *Monette* has subsequently been cited by this court as establishing the proper standard

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[1] While not relevant to his inquiry, the Rehabilitation Act also requires a showing of receipt of government funds a finding which is not required under the ADA.

for a *prima facie* case under the ADA. Cassidy v. Detroit Edison Co., 138 F.3d 629, 633 (6th Cir. 1998) (citing the *Monette* three prong test); and *Hile v. Pepsi-Cola Gen Bottlers, Inc.*, No. 95-4361 1997 WL 112404, *3 (6th Cir. 1997) (unpublished). While Appellant attempts at length to distinguish this test away as dicta from the *Monette* case and its progeny, this is an overly narrow reading of *Monette* which is not supported by the text.

Alternatively, Appellant argues that *Monette* establishes a different test for establishing a *prima facie* case in the context of disparate treatment/indirect evidence claims. In this case, the Appellant argues, he was entitled to an instruction based upon the 5-factor standard articulated in *Monette* for establishing a *prima facie* case raising claims based upon indirect evidence.[2] This argument is wholly without merit. Layman and Alloway stipulated to the *prima facie* case. As the district court correctly noted in its denial of the Plaintiff's Federal Rule

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2

As articulated in *Monette*, a plaintiff may establish a *prima facie* case of handicap discrimination by showing that: "1) he or she is disabled, 2) is otherwise qualified for the job, with or without 'reasonable' accommodation, 3) suffered an adverse employment decision, 4) the employer knew or had reason to know of his or her disability, and 5) after rejection or termination the position remained open, or the disabled individual was replaced." *Monette*, 90 F.3d 1185 (internal citations omitted).

of Civil Procedure 59 motion for a new trial, once the matter has been tried and a judgment rendered, the proper inquiry is not what constitutes a *prima facie* case, but rather what constitutes discrimination. "Following a trial on the merits, the district court, therefore, cannot return to a consideration of whether plaintiff has proven its *prima facie* case. This is a preliminary matter which cannot be revisited at a later time." *E.E.O.C. v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997). Quite simply, it cannot be error to fail to instruct the jury with regard to something that is not before them.

Accordingly, because the Appellant failed to raise an objection to the "solely because of" standard below, this court reviews for plain error. Because the Sixth Circuit adopted the "solely because of" test in *Monette*, and has used that test in subsequent cases, the district court's reliance on it is not plain error. Finally, because whether Layman established a *prima facie* case was not before the jury, he was not entitled to a jury instruction on that question.

B.

In the alternative, Appellant argues that if this circuit does apply the "solely because of" disability standard in ADA cases, this panel should correct the error. We are sympathetic to Appellant's view of the law. The plain language of the statute strongly supports his reading.

In applying the same rule for the ADA as for the Rehabilitation Act, the *Maddox* court (and *Monette*, which relied upon *Maddox*) failed to take into account that the language of the Rehabilitation Act prohibits discrimination "*solely* by reason of her or his disability," while the language of the ADA prohibits discrimination "*because* of the disability." *Compare* Rehabilitation Act, 29 U.S.C. § 794(a) (1994) (emphasis added), with ADA, 42 U.S. C. § 12112(a) (emphasis added).[3] It is therefore not surprising

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3

Appellant's comparison to Title VII is less convincing. IN arguing that this court should adopt the "mixed motive" standard, Appellant claims that "[g]iven the fact that Title VII uses the exact same 'because of' language as the ADA, it necessarily follows that the 'motivating factor' analysis also applies to ADA cases." Appellant fails to realize that Title VII is subject to mixed motives analysis not on the basis of the "because of " language, but rather because Congress modified the statue expressly to adopt that standard. 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.") Congress did so to codify the mixed motives position which failed to mister a majority of the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). H.R. Rep 102-40(II), at 2-3 (1991), *reprinted* in 1991 U.S.C.C.A. N. 549. The modification of Title VII to adopt the "motivating factor" standard suggests that the "because of" language is not alone sufficient to trigger "mixed motives" review.

that a number of our sister circuits have found that a mixed motive analysis is appropriate. *See, e.g., Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 336-37 (2nd Cir. 2000) (adopting a mixed motive analysis, and noting the approval of the First, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits to mixed motive analysis for ADA claims). *See Baird v. Rose County School Bd.*, 192 F.3d 462, 468 Cir. 1999) (expressly rejecting "solely because of" standard). Despite the persuasive textual argument and the weight of authority from other circuits, this court has established a standard to which this panel is bound. While review of the *Monette* standard may present an interesting question for the *en banc* court, we are bound by that decision. "This panel may not overrule the decision of another panel; the earlier determination is binding authority unless a decision of the United States Supreme Court mandates modification or this Court sitting en banc overrules the prior decision." *United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000) (citing *Salmi v. Sec'y of Health & Human Servs*, 774 F.2d 685, 689 (6th Cir. 1985)).

III.

Appellant next appeals the district court's instruction regarding pretext. Because the Appellant did object below to the instruction regarding pretext, this court "may reverse [the] judgment on the basis of improper jury instruction only if the instructions, when viewed as a whole, were confusing, misleading and prejudicial."

Roberts v. Galen of Va., Inc. 325 F.3d 776, 787 (6th Cir. 2003). *Roberts* clarified that his standard is conjunctive, and therefore to qualify for reversal a moving party must show prejudice. *Id* at 787 n.3. Accordingly, the *Roberts* court found that the jury instructions at issue in that case were "erroneous" and "incorrect" but the court would not reverse because the plaintiff failed to prove prejudice. *Id.* at 788-89.

In the case before us, in instructing the jury on the question of pretext the district court stated:

> If you find by a preponderance of the evidence that the defendant's reason for firing Mr. Layman is a mere pretext or "cover-up" for what was in truth disability discrimination, then you are permitted to infer that the defendant intentionally discriminated against the plaintiff. By pretext, I mean that the reason given by the defendant for its decision is not the real reason , but is a reason given to obscure the fact that the plaintiff's disability was the sole motivating factor.
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> To prove that the defendant's asserted reason for firing him is pretextual, Mr. Layman must prove that the defendant's reason has not basis in fact or that the reason did not in fact motivate the decision to fire him.

Citing *Smith v. Chrysler Corp.*, 155 F.3d 799, 805-06 (6th Cir. 1998), Layman argues that the district court's instruction was insufficient because it failed to list all three methods a plaintiff may use to establish pretext: (1) that the proffered reasons had no basis in fact; (2) that the proffered reasons did not actually motivate the employment decision, which requires additional evidence of discrimination; or (3) that the proffered reasons were never used in the past to discharge an employee. Layman asserts that this error is particularly egregious because he sought to establish pretext by means of the third method, specifically by showing that Miller and Shepherd were not fired despite violation of the rules.

While the test as spelled out by Layman has been used on some occasions, the more common exposition of the third method of proving pretext is found in *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994), which this court applied to the ADA context in *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 883 (6th Cir. 1996). Under the *Manzer* formulation, the first two methods are the sam as in *Smith v. Chrysler Corp.*, however, the third method of proving pretext differs (at least in form): the plaintiff may establish that the reasons proffered by the employer for the termination "were *insufficient* to motivate discharge". *Manzer*, 29 F.3d at 1084 (emphasis in original); *accord Kocsis*, 97 F.3d at 883. The Manzer court noted that his showing ordinarily "consists of evidence that other employees, particularly

employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff." *Manzer*, 29 F.3d at 1084.

While the district court's jury instruction specifically states the first and second methods of establishing pretext, it fails even to mention the third, utilizing either the *Smith* or Manzer formulation, and the instruction is therefore erroneous. We must therefore determine whether Layman was prejudiced by this error. We conclude that he was not. Layman's evidence was insufficient as a matter of law to permit a jury to find that other employees who violated the shop safety policy that was in place at the time of Layman's violation did not receive treatment similar to that which he received. As we discussed above, Miller was suspended rather than terminated for a violation that the plaint manager did not actually witness and that occurred prior to Alloway's new policy requiring every employee to sign a copy of the safety rule-a policy that was clearly in place at the time of Layman's violation. The evidence regarding Shepherd is arguably even less probative. Shepherd testified that he could not recall whether his warning from the shop manager for an infraction of the safety rule occurred before or after Miller's suspension and the subsequent new policy requiring every plant employee to sign a copy of the safety rule. Shepherd's testimony therefore fails to establish whether his infraction occurred under the policy which was

in place when Layman violated the rule. Accordingly, Layman provided no evidence that other employees were treated differently than he was under the policy which was in place at the time of his violation. For this reason, even if the jury had been given the appropriate jury instruction under *Kocsis*, Layman could not have succeed on his claim. Accordingly, under the standard adopted in *Kocsis*, Layman was not prejudiced by the error. Because there is no prejudice this court may not overturn the jury's verdict.

IV.

Appellant next argues that the trial court erred in permitting Alloway to introduce evidence of Layman's workers' compensation claim. Alloway counters that, notwithstanding the denial of Layman's motion *in limine* seeking to prevent introduction of this evidence, it was Layman who, on direct examination, first introduced evidence regarding payments received from Alloway. Because Layman opened the door to this evidence, Alloway argues, he cannot here object. *See* *United States v. Khalil*, 279 F.3d 358, 364 (6th Cir. 2002); *United States v. Brown*, 276 F.3d 211, 218 (6th Cir. 2002). Layman responds that the issue is whether the motion *in limine* should have been granted, not whether the door was opened by his direct examination. Specifically, he suggest that he introduced such evidence because the motion *in limine* has been denied. And Layman correctly contends that neither of the cases cited by Alloway addressed the situation at

bar-that is, one in which a party whose motion *in limine* is denied introduces the evidence that party sough to keep out.

This court need not decide the issue of whether the introduction at trial of evidence that was the subject of a motion *in limine* waives that right to appeal the denial of the motion *in limine*. It is clear that the district court's decision to deny the motion was proper. The district court has broad discretion to determine the admissibility and relevance of evidence, and we will overturn those determinations only for abuse of discretion. Snyder v. Ag Trucking, Inc., 57 F.3d 484, 492 (6th Cir. 1995). Here, the evidence concerning payments made by Alloway in excess of those required by Tennessee law as part of workers' compensation was clearly relevant to Layman's claim that Alloway had an intent to discriminate against him. The trial court therefore did not err in permitting the jury to hear this evidence.

V.

For the foregoing reasons, we AFFIRM the judgment of the district court.

2004 WL 719262 (6th Cir. (Tenn.))